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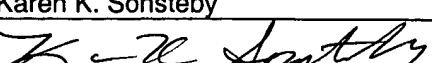
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PATENT APPLICATION

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of)
Lackey, George C.)
)
Application No. ~~09/333,615~~ 10/631,230)
)
Filed: July 31, 2003)
)
For: *Apparatus and Method for Supporting*)
 A Firearm)
)
Attorney Docket No. 74123-001)

Art Unit: 3641

Examiner: Michelle (Shelley) Clement

St. Louis, Missouri 63105-3441
August 22, 2005

Honorable Commissioner of
Patents and Trademarks
Washington, D.C. 20231

APPEAL

Real Party in Interest

The real party in interest is the party named in the caption of this brief.

Related Appeals and Interferences

No other appeals or interferences affect this application.

Status of Claims

Claims 1-13 are currently pending in the application. Claims 3 and 7 are subject to a restriction requirement issued by the Examiner, and examination of these two claims is dependent on the allowance of an identified generic claim upon which those claims depend. The Examiner has acknowledged that claims 1, 4, 5, and 8-12 are generic. Claims 1, 2, 4-6, and 8-13

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are rejected as they presently exist, *i.e.*, after the amendment and response dated October 15, 2004.¹ Claims 1, 2, 4-6, and 8-13 are the claims appealed.

Status of Amendments

Claim 1 was amended and claims 14 and 15 cancelled in a response filed on October 15, 2004, to the Examiner's First Office Action.² The Examiner entered a Final Office Action on April 22, 2005. Applicant has not submitted any amendments to the claims subsequent to the Examiner's Final Office Action. Applicant filed his notice of appeal on June 22, 2005.

Summary of the Invention

Specification—p. 3, lines 22 through 26; p. 4, lines 1 through 15; p. 5, lines 22-27; p. 6, lines 1 through 5.

The present invention is directed to a novel portable gun rest that may be easily carried, works with shafts of varying diameters and lengths, including walking sticks, and provides a stable and generally horizontal support for a firearm. In addition, according to one aspect of the invention, the gun rest may be positively fixed in a position on a particular shaft or stick yet also readily adjusted to various heights along the entire length of the shaft.

The gun rest includes an elongated support member having a clamping surface and a firearm supporting surface; a collar connected with the elongated support member; and an adjustable mechanism connecting the collar with the elongated support member and adjusting the position of the collar relative to the clamping surface of the support member, the collar and clamping surface securing the support member to the shaft. In one embodiment the adjustable mechanism includes an elongated threaded member connected with the collar and the elongated

¹ The amendment to claim 1 and cancellation of claims 14 and 15 were resubmitted on January 6, 2005 in response to a notice of non-compliant response.

² See n. 1 above.

support member and a fastening device associated with the threaded member. In an alternate embodiment, the adjustable mechanism includes an adjustable clamp connected with the elongated support member and integrated with the collar.

Applicant's invention provides the ability to be used with almost any shaft, including a walking stick that the user already possesses or are a tree limb readily found in the field, while also providing ready height adjustability of the rest to accommodate almost any shooting position, including sitting, kneeling, and standing, regardless of the height or age of the user. A key advantage to Applicant's invention is that while providing this flexibility of use, it still provides a firm, stable, horizontal support surface for the user's firearm.

Issues

1) In the Final Office Action, dated April 22, 2005, the Examiner rejected amended claim 1 and original claims 2 and 6 under 35 U.S.C. §102(b) as anticipated by or, in the alternative, under 35 U.S.C. §103(a) as obvious over U.S. Patent No. 3,302,497 to Paden (the “‘497 patent”). First, the stated rejection under 35 U.S.C. §102(b) is inappropriate as to each of claims 1, 2, and 6 because the ‘497 patent lacks an express limitation of independent claim 1, upon which claims 2 and 6 depend, namely that “said clamping surface and said firearm supporting surface are integral with the elongated support member.” The Examiner acknowledges this obvious shortcoming of the ‘497 patent at page 3 of the Final Office Action. Second, the ‘497 patent represents non-analogous art, as is the case with the other prior art references cited by the Examiner in the Final Office Action. Finally, the pipe wrench of the ‘497 patent lacks a clamping surface that includes upper and lower support arms and a collar slot separating the upper and lower support arms as required by claim 6.

2) Claims 4, 5, and 8-10 were rejected under 35 U.S.C. §103 as being unpatentable over the ‘497 patent in view of U.S. Patent No. 5,829,099 to Kopelman et al. (the “‘099 patent”). Claims 4, 5, and 8-10 depend from independent claim 1. Applicant refers to and incorporates the above described deficiencies of the ‘497 patent with respect to this issue. The ‘099 patent, which is directed to a universal ergonomic handle, does not address these deficiencies of the ‘497 patent as a prior art reference. The ‘099 patent, like the ‘497 patent, is non-analogous art with respect to Applicant’s claimed invention.

3) Claims 11 and 12 were rejected under 35 U.S.C. §103 as being unpatentable over the ‘497 patent in view of U.S. Patent No. 3,805,646 to Knight (the “‘646 patent”). Claims 11 and 12 depend from independent claim 1. Applicant refers to and incorporates the above described deficiencies of the ‘497 patent with respect to this issue. The ‘646 patent, which is directed to a chain wrench, does not address these deficiencies of the ‘497 patent as a prior art reference. The ‘646 patent, like the ‘497 patent, is non-analogous art with respect to Applicant’s claimed invention.

4) Claims 1 and 13 were rejected under 35 U.S.C. §103 as being unpatentable over European Patent No. EP 618045 to Scholl et al. (the “Scholl patent”). First, the Scholl patent, which discloses a strap wrench for removal of automobile oil filters, represents non-analogous art. Second, with respect to claim 13, the Scholl patent lacks “a set of collars of varying diameters.” It would not have been obvious to provide straps of varying lengths for the strap wrench of the Scholl patent because it is expressly designed to accommodate a specific type of object, automobile oil filters, and the known variances of those filters without the need to change straps.

A copy of the claims involved in the appeal is attached as Appendix A.

Grouping of Claims

- 1) With respect to the first stated ground of rejection contained in the Final Office Action, which was applied to claims 1, 2, and 6, Applicant asserts that his grounds for appeal based on (a) the inappropriateness of the Examiner's rejection under 25 U.S.C. §102(b), (b) the fact that the '497 patent is non-analogous prior art, and (c) the fact that the '497 lacks the required element of "said clamping surface and said firearm supporting surface are integral with the elongated support member" are relevant to the patentability of each of claims 1, 2, and 6. Applicant's ground for appeal based on the fact that the '497 patent does not disclose or suggest a clamping surface that includes upper and lower support arms and a collar slot separating the upper and lower support arms is relevant to the patentability of claim 6.
- 2) With respect to the second stated ground of rejection directed to claims 4, 5, and 8-10, Applicant asserts that his grounds for appeal based on (a) the fact that the '497 patent is non-analogous prior art, (b) the fact that the '497 lacks the required element of "said clamping surface and said firearm supporting surface are integral with the elongated support member," and (c) the fact that the '099 patent is non-analogous prior art are relevant to the patentability of each of claims 4, 5, and 8-10.
- 3) With respect to the third stated ground of rejection directed to claims 11 and 12, Applicant asserts that his grounds for appeal based on (a) the fact that the '497 patent is non-analogous prior art, (b) the fact that the '497 lacks the required element of "said clamping surface and said firearm supporting surface are integral with the elongated support member," and (c) the fact that the '646 patent is non-analogous prior art is relevant to the patentability of each of claims 11 and 12.

4) With respect to the fourth stated ground of rejection directed to claims 1 and 13, Applicant asserts that his grounds for appeal based on the fact that the Scholl patent is non-analogous prior art is relevant to the patentability of each of claims 1 and 13. Applicant's ground for appeal based on the fact that the Scholl patent does not disclose, suggest, or render obvious "a set of collars of varying diameters" is relevant to the patentability of claim 13.

Argument

In the First Office Action, dated July 16, 2004, the Examiner rejected original claims 1, 2, 4-6, and 8-11 under 35 U.S.C. §102(e) as anticipated by U.S. patent No. 6,588,637 to Gates et al. (the "637 patent"). Claim 12 was rejected under 35 U.S.C. §103 as being unpatentable over the '637 patent. Finally, claims 1, 2, 4-6, 8-11, and 13 were rejected under 35 U.S.C. §103 as being unpatentable over U.S. Patent No. 4,531,643 to Bradley (the "643 patent") and U.S. Patent No. 1,090,929 to McFaddin (the "929 patent"). Applicant responded to the First Office Action by amending claim 1³.

³ Claim was amended as follows:

1. A firearm supporting apparatus suitable for use with shafts of varying diameters and lengths, including:
 - an elongated support member having an end surface and a top surface, wherein said end surface further comprises a clamping surface and said top surface further comprises a firearm supporting surface and said clamping surface and said firearm supporting surface are integral with the elongated support member;
 - a collar connected with the elongated support member; and
 - an adjustable mechanism connecting the collar with the elongated support member and adjusting the position of the collar relative to the clamping surface of the support member, resulting in movement of the collar relative to the clamping surface in a direction parallel to the elongated support member, the collar and clamping surface securing the support member to the shaft.

In the Final Office Action, the Examiner noted consideration of Applicant's amendments in response to the Office Action of July 16, 2004, but concluded that those amendments were rendered moot in view of new grounds of rejection. The Examiner then rejected amended claim 1 and original claims 2 and 6 under 35 U.S.C. §102(b) as anticipated by or, in the alternative, under 35 U.S.C. §103(a) as obvious over the '497 patent. Claims 4, 5, and 8-10 were rejected under 35 U.S.C. §103 as being unpatentable over the '497 patent in view of the '099 patent. Claims 11 and 12 were rejected under 35 U.S.C. §103 as being unpatentable over the '497 patent in view of the '646 patent. Claims 1 and 13 were rejected under 35 U.S.C. §103 as being unpatentable over the Scholl patent. The Examiner concluded that Applicant's amendments in response to the Office Action of July 16, 2004 necessitated the new grounds of rejection presented in the Final Office Action.⁴

A. The Rejection Under 35 U.S.C. §102(b) In The Final Office Action Was Improper

In the Final Office Action, the Examiner rejected amended claim 1 and original claims 2 and 6 under 35 U.S.C. §102(b) as anticipated by or, in the alternative, under 35 U.S.C. §103(a) as obvious over '497 patent. The stated ground of rejection under 35 U.S.C. §102(b) is improper

⁴ While not generally presented as a ground for appeal, Applicant also respectfully submits that the issuance of the Final Office Action in this matter was premature. In response to the First Office Action, Applicant amended only original claim 1. The amendments made to claim 1 made no significant change to either the nature or scope of claim 1. Furthermore, the amendments did not add or remove limitations but, rather, clarified the physical relationship among the "elongated support member," "clamping surface," and "firearm supporting surface" limitations and the manner in which the "adjustable mechanism" moved the "collar." These limitations were each included in original claim 1. In contrast to the limited nature of Applicant's amendments to claim 1, the prior art references upon which the rejections within the Final Office Action were based represented a significant departure from the prior art references cited in the First Office Action. Therefore, Applicant respectfully requests that the Examiner reconsider the finality of the Final Office Action.

because the '497 patent lacks an express limitation of independent claim 1, upon which claims 2 and 6 depend, namely that "said clamping surface and said firearm supporting surface are integral with the elongated support member."

The unequivocal view of the Federal Circuit is that a single reference must teach, *i.e.*, identically describe each and every element of the rejected claim for a proper rejection under 35 U.S.C. § 102. *See Atlas Powder v. E.I. duPont*, 750 F.2d 1569, 224 U.S.P.Q. 409 (Fed. Cir. 1984). Claim 1, upon which claims 2 and 6 depend, includes the express limitation that "said clamping surface and said firearm supporting surface are integral with the elongated support member." The Examiner expressly acknowledged at page 3 of the Final Office Action that the '497 patent does not describe this limitation: "... [the '497 patent] does not expressly disclose the clamping surface and the supporting surface being integral with the elongated support member." Therefore, the '497 patent does not teach each and every element of claim 1 and cannot support a proper rejection under 35 U.S.C. §102.

B. The Prior Art References Cited By The Examiner In The Final Office Action Are Non-Analogous To Applicant's Claimed Invention

In the Final Office Action, the Examiner relies on four prior art references: the '497 patent, '099 patent, the '646 patent, and the Scholl patent. Each of the '497, '646, and Scholl patents are directed to hand tools, specifically, chain or strap wrenches. The '099 patent is directed to a universal ergonomic handle. Each of these references is cited in support of separate obviousness rejections under 35 U.S.C. § 103. Applicant respectfully submits that these prior art references are drawn to non-analogous art and, therefore, cannot properly support an obviousness rejection of Applicant's claims.

The proper initial factual determination in assessing obviousness of a claimed invention is to identify the scope and content of the prior art. *Graham v. John Deere Co.*, 383 U.S. 1, 17-

18, 86 S.Ct. 684, 693-94, 15 L.Ed.2d 545, 148 U.S. P.Q. 459, 467 (1966). The field of the inventor's endeavor and the particular problem with which the inventor was involved are examined to ascertain the proper scope of the prior art. *Monarch Knitting Machinery Corp. v. Sulzer Morat GmbH*, 139 F.3d 877, 881, 45 U.S.P.Q.2d 1977, 1981 (Fed. Cir. 1998). The application identifies the field of Applicant's endeavor as firearm accessories. Specification, p. 1, line 4. The particular problem with which Applicant was involved was the development of a portable gun rest that could be used with shafts or sticks of varying dimensions and provides a stable horizontal support surface. Specification, p. 3, lines 15-17.

The determination of whether a reference is from a non-analogous art similarly focuses on two questions: (1) whether the reference is within the field of the inventor's endeavor and, if not, (2) whether the reference is reasonably pertinent to the particular problem with which the inventor was involved. *In re Deminski*, 796 F.2d 436, 442, 230 U.S.P.Q. 313, 315 (Fed. Cir. 1986). As identified above, Applicant's field of endeavor is the area of firearm accessories. The particular problem that Applicant was addressing was providing a portable and stable horizontal support surface from which a hunter could fire a firearm that could be used with vertical supports of almost any dimension.

It is clear that the references cited in the Final Office Action are not within the field of Applicant's endeavor. Each of the '497, '646, and Scholl patents are directed to hand tools, specifically, chain or strap based wrenches for pipes, in the case of the '497 and '646 patents, and automobile oil filters, in the case of the Scholl patent. The '099 patent is directed to a universal ergonomic handle for hand and power tools. '099 Patent, column 1, line 52 to column 2, line 12. Hand tools, and, in particular, pipe wrenches, have no relation whatsoever to

firearms, firearm accessories, or hunting. Therefore, it simply cannot be said that these items are within the field of Applicant's endeavor.

Furthermore, these references are not reasonably pertinent to the particular problem being addressed by Applicant. Applicant's efforts were directed to providing a portable and stable horizontal support surface for a firearm that can be used with almost any vertical support means. As a practical manner, the key issue in solving this problem is providing a readily adjustable means for attaching the support surface to the vertical support while minimizing or eliminating any deflection or other vertical movement of the support surface, relative to the vertical support, upon the application of a downward force, namely the weight of the firearm.

In contrast, the purpose and function of the chain and strap wrenches of the '497, '646, and Scholl patents is to provide a means by which a user may impart a torsional force upon an object, specifically, a pipe, tube, or oil filter. These references do not speak at all to the key issue of providing a horizontal support surface and eliminating vertical deflection of that surface when a downward force is introduced. Response to vertical forces introduced on a handle of a wrench is simply not a consideration in pipe or oil filter wrench design. The '099 patent is directed only to the issue of preventing repetitive motion injuries arising from the use of hand tools. Applicant's claimed invention does not possess or require a handle, and, as such, repetitive motion injuries were not a relevant concern in its development. Therefore, it cannot be said that these patents are pertinent to the particular problem addressed by Applicant.

Furthermore, there is no suggestion or motivation contained within the cited references leading one of ordinary skill in the art to use and combine these references. Applicant respectfully submits that the citation of these references may represent the application of hindsight based on the teaching of the present application, which is a practice that the Federal

Circuit has counseled against. *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992) (“The combination of elements from non-analogous sources, in a manner that reconstructs Applicant’s invention only with the benefit of hindsight, is insufficient to present a *prima facie* case of obviousness. There must be some reason, suggestion, or motivation found in the prior art whereby a person of ordinary skill in the field of the invention would make the combination. That knowledge can not come from the applicant’s invention itself.”).

As further support for the conclusion that the references cited in the Final Office Action are drawn to a non-analogous art, Applicant notes that hand tools⁵, which are representative of the cited references are classified in a completely different class than are firearm accessories, such as gun rests⁶. The distinct and separate classification of these items is additional evidence that cited references are neither related nor pertinent to Applicant’s claimed invention.

For the above stated reasons, each of the rejections under 35 U.S.C. §103 in the Final Office Action are improperly based on non-analogous art and should be removed.

C. The ‘497 Patent Does Not Disclose Or Suggest A Clamping Surface That Includes Upper And Lower Support Arms And A Collar Slot Separating The Upper And Lower Support Arms

In the Final Office Action, the Examiner rejected amended claim 1 and original claims 2 and 6 under 35 U.S.C. §102(b) as anticipated by or, in the alternative, under 35 U.S.C. §103(a) as obvious over the ‘497 patent. In particular, the Examiner asserts that the ‘497 patent teaches a clamping surface that includes upper and lower support arms and defines a collar slot separating the upper and lower support arms. Final Office Action, p. 3. This limitation is introduced in claim 6.

⁵ The primary classification for the ‘497 and ‘646 references is U.S. Class 81 – Hand Tools. The primary classification for the ‘099 patent is U.S. Class 16 – Miscellaneous Hardware.

⁶ U.S. Class 42/Subclass 94 is the appropriate classification for gun rests.

Applicant respectfully submits that the '497 patent does not in fact teach separate support arms and a collar slot. Instead, the '497 patent describes a single jaw (90) that has a gripping surface (96) having teeth (98). There is no reference anywhere within the '497 patent to any structure like the clamping surface of claim 6 with upper and lower support arms and a collar slot. Therefore, the '497 patent neither describes nor suggests in any manner an express limitation of claim 6 and does not support either the stated §102(b) or rejections of claim 6 advanced in the Final Office Action.

D. The Scholl Patent Does Not Disclose Or Suggest A Set Of Collars Of Varying Diameters

Claim 13 was rejected under 35 U.S.C. §103 as being unpatentable over the Scholl patent. Claim 13 introduces a limitation of “a set of collars of varying diameters and wherein the collar is selected from the set based on a diameter of the shaft.” The Scholl patent discloses a strap-based wrench for the removal of automotive oil filters. As indicated in Fig. 10 of the Scholl patent, the strap of the wrench is designed with an adjustment means to increase and decrease the diameter of the strap. Clearly the design described in the Scholl patent is intended to provide flexibility of use by varying the diameter of the strap, not by exchanging straps.

It would not have been obvious to provide straps of varying lengths for the strap wrench of the Scholl patent because it is expressly designed to accommodate a specific type of object, automobile oil filters, and the known variances of those filters, by adjustment of the strap itself, not replacement of the strap. Indeed, replacing the strap defeats the very purpose of the design described in the Scholl patent and changes its principle of operation, which is not a permissible modification of a prior art reference. *In re Ratti*, 270 F.2d 810, 123 U.S.P.Q. 349 (C.C.P.A. 1959). Therefore, Applicant respectfully submits that the Scholl patent does not render obvious the use of a set of collars of varying diameters as described in claim 13.

Conclusion

The rejections under 35 U.S.C. §§ 102(b) and 103 advanced in the Final Office Action are contrary to law. Accordingly, it is submitted that the rejections are improper and Applicant prays for a finding in his favor.

Respectfully submitted,


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APPENDIX A

1. A firearm supporting apparatus suitable for use with shafts of varying diameters and lengths, including:

an elongated support member having an end surface and a top surface, wherein said end surface further comprises a clamping surface and said top surface further comprises a firearm supporting surface and said clamping surface and said firearm supporting surface are integral with the elongated support member;

a collar connected with the elongated support member; and

an adjustable mechanism connecting the collar with the elongated support member and adjusting the position of the collar relative to the clamping surface of the support member, resulting in movement of the collar relative to the clamping surface in a direction parallel to the elongated support member, the collar and clamping surface securing the support member to the shaft.

2. The firearm supporting apparatus as set forth in claim 1, wherein the adjustable mechanism includes an elongated threaded member connected with the collar and the elongated support member and a fastening device associated with the threaded member, wherein tightening and loosening the fastening device on the threaded member adjusts the position of the collar relative to the clamping surface.

3. The firearm supporting apparatus as set forth in claim 1, wherein the adjustable mechanism includes an adjustable clamp connected with the elongated support member and wherein the collar is a flexible band associated with the adjustable clamp.

4. The firearm supporting apparatus as set forth in claim 1, wherein the firearm supporting surface is contoured.

5. The firearm supporting apparatus as set forth in claim 4, wherein the firearm supporting surface is a concave cradle.

6. The firearm supporting apparatus as set forth in claim 2, wherein the clamping surface includes upper and lower support arms and wherein the support member defines a collar slot separating said upper and lower support arms.

7. The firearm supporting apparatus as set forth in claim 3, wherein the support member defines a transverse hole and wherein the adjustable clamp is inserted into the transverse hole.

8. The firearm supporting apparatus as set forth in claim 1, further including a flexible material covering a portion of the elongated support member.

9. The firearm supporting apparatus as set forth in claim 1, wherein at least the firearm supporting surface is covered by a flexible material.

10. The firearm supporting apparatus as set forth in claim 9, wherein the flexible material is provided with a non-skid surface.

11. The firearm supporting apparatus as set forth in claim 1, wherein the clamping surface is concave.

12. The firearm supporting apparatus as set forth in claim 1, wherein the clamping surface is covered by a flexible material.

13. A firearm supporting apparatus as set forth in claim 1, further including a set of collars of varying diameters and wherein the collar is selected from the set based on a diameter of the shaft.